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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1955

No. 27

National Labor Relations Board, Petitioner

Vs.

The Warren Company, Incorporated

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE RESPONDENT, THE WARREN COMPANY, INCORPORATED.

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treat its refusal (to bargain) *as a contempt, until after the Board has certified the result.*"

In *National Labor Relations Board Vs. National Licorice* 104 Fed.(2d) 655, C.C.A.2d, decided June 12, 1939, the same Court entered an enforcement order conditioned upon the Board's holding a new election to determine the majority status of the contending union. The Court said, "The workmen are few and an election will not be an onerous condition." This procedure was approved by this Court when the case was before it on review. (309 U.S. 350.)

In *Hamilton Brown Shoe Co. Vs. National Labor Relations Board*, 104 Fed.(2d) 49, decided May 29, 1939 by the 8th Circuit, an enforcement order was entered, but the Court directed the Board to hold an election. The Court said: "We are of the view that it would be arbitrary and unfair, and not in keeping with either the letter or the spirit of the Act to require the employer and its employees to conduct their negotiations through an agency not fairly representing a majority of the employees. In the face of the record as it now stands, it cannot be assured that the Union is now the accredited representative of the employees."

Cupples Co. Mfrs. Vs. National Labor Relations Board, decided August 1, 1939 (C.C.A.8th), 106 Fed. (2d) 100:

> "The Board apparently has all the power and machinery which it needs for ascertaining, through an honest election by secret ballot, held under its direction whether this Union . . . is in fact the chosen representative of the employees."

In *Stewart Die Casting Vs. National Labor Relations Board*, 114 Fed.(2d) 849, decided July 3, 1940 (C.C.A.7th), the Court conditioned enforcement on a

Board conducted election, saying: "We think our authority to impose such a requirement is found in Fansteel Metallurgical, 2 27 39, 306 U.S. 240, and National Licorice 3 4 40, 309 U.S. 350. We should think the Union itself would welcome an opportunity to demonstrate that it represents a majority and we see no reason why the Board should object. We are not unmindful of the familiar argument advanced by the Board that a fair election cannot be had until the last vestige of unfair labor practices has been removed as required by the Board's order. In other words, so it is argued, the unfair acts on the part of the employer create in the employee a state of mind which prevents a free expression of opinion on his part. To us this argument is imaginary rather than real. In fact, the opposite effect, if any, would be the natural result. We accord to the ordinary employee intelligence such as will enable him to know when he is being imposed upon by his employer, as well as the ability to properly protect his own interest in an election conducted by secret ballot, for the purpose of determining whom he desires as his bargaining agent."

What could have been the purpose of Congress in the adoption of the above amendments to the Act if it were not the purpose to guarantee beyond the possible contrary determination by the Board the absolute freedom of choice by the employees. This freedom was to be unencumbered and unhampered by any arbitrary or doctrinal regulation of a Board which might, in interpreting the law, consider itself as being created for the sole function of protecting a Union — and not the employee. The Congress was clear and positive in its amendments. The history of the old Board and its rulings were before it. It sought to correct the abuses of the employees. Under the old law employees who

wanted no union had no machinery which they could set in motion to repudiate a Union. The new law gave that machinery. Congress required the Board to hold inviolate the freedom of choice through a secret ballot given those employees. To force an agent upon them not of the choosing of the employees, and to deny them the statutory method of secretly stating their preference was violative of the expressed intent of Congress.

II.

CONCLUSION

It is respectfully urged that the Court consider the above history of the amendments to the Act.

Respectfully submitted,

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P. O. Box 250,
Decatur, Georgia
October, 1955.

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I.

The Intent of Congress Revealed in the Amendments to the Wagner Act in Passing the 1947 Labor-Management Relations Act.

Supplementing its brief in chief, Respondent desires to call to the Court's attention the evident intention of Congress in adopting certain amendments in the year 1947 to the existing labor law.

The intent and purpose of the Act and the amendments was the protection not of the employer or the Union, but of the employee. It was never the purpose of the Congress to thwart the desire of the employees to be represented or not to be represented by a Union.

The Congress attempted to place every safeguard to insure the freedom of choice of the employee. The employees were to be represented by an Agent of their own choosing, and none other. And the selection of that representative was to be safeguarded through processes initiated by the Government granting a secret ballot. If those employees desired no bargaining agent, they were given that prerogative by the Congress. This is first guaranteed in Section 7 of the Act wherein it is expressly provided: "Employees shall have the right to self-organization, to form, join or assist labor organizations, *to bargain collectively through representatives of their own choosing*, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and *shall also have the right to refrain from any or all of such activities . . .*"

This latter part of Section 7, insuring the right to refrain from such activities, was not in the original Wagner Act, but was added in the Act of 1947. While the Section, together with the policy set forth in Section 1, would seem to favor collective bargaining as a National Labor Relations policy, yet the amended Act would seek to give the employee absolute freedom of choice — to choose whether or not he will be a part and parcel of collective bargaining.

The House and Senate Conference Report on June 3, 1947 (Page B-9 The New Labor Law, Bureau of National Affairs) said of Section 7 and its amendment: "Both the House Bill and the Senate amendment in amending the National Labor Relations Act preserved the right under Section 7 of that act of employees to self-organization (etc.) . . : The House Bill made two changes in that Section . . . (Second), it was specifically set forth that employees were also to have the

right to refrain from self-organization, etc., if they chose to do so. . . ."

Conference Report (Page B-18, The New Labor Law): "It must be emphasized that one of the principal purposes of the National Labor Relations Act is to *give employees full freedom to choose or not to choose representatives* for collective bargaining. As has already been pointed out in the discussion of Section 7 the Conference Agreement guarantees in express terms the right of employees to refrain from collective bargaining or concerted activities if they chose to do so."

The Senate Labor Committee Report (Page C-3):

> "The major changes which the bill would make in the National Labor Relations Act may be summarized as follows: (5) In the interests of assuring complete freedom of choice to employees who do not wish to be represented collectively as well as those who do, *it requires* the Board to *enlarge* the rights of petition in representation cases . . ."

The right to choose a Union or to repudiate a Union through the means of an election was to be unencumbered, where there had been no *valid election* within the preceding twelve months. There was to be no hindrance to the right of petition of employees for an election where they had never been granted an election to determine their wishes.

The new Act sought in every way to secure that right to choose or repudiate a bargaining agent. Under Section 9 (c) (1) an election may be sought by the employees to rescind a Union's right to represent employees. This should be true at any time, especially where there has never been an election to determine the representative status, and it seemingly was not the

intention of Congress that the employees should be arbitrarily denied the right of rescission by the Board.

Section 9 (c) (1) of the Wagner Act which gave the Board complete discretion in investigating representation petitions was amended to limit that discretion by *requiring* the Board "to investigate petitions filed by . . . a group of employees who assert that the labor organization formerly certified as bargaining agent no longer represent a majority of employees. . . ."

The prohibition against entertaining a petition seeking an election for certification or decertification only applies when a *valid election* has been held within the preceding twelve months. The Conference Committee's report stresses the requirement of a valid election within the twelve month period before the processes of a Board conducted election for decertification could be denied. Page B-20 Conference Report: "Under the House Bill, in Section 9 (f) (7) it was provided that no election could be directed in any bargaining unit or any subdivision hereof within which, in the preceding twelve month period, a *valid election* had been held, except upon a petition by employees requesting decertification of a representative. The Senate amendment, in Section 9 (c) (3), contained a similar provision without the exception. The conference committee adopts the provisions of the Senate amendment."

Thus it will be seen that the House desired decertification petitions processed at any time regardless of circumstances. But the House and Senate came to agreement that the processes could be denied within the 12 month period only after a *valid* election had been held in that period.

The Conference Report further elaborates on this Section 9 (c). Page B-20: "Both the House Bill and the

Senate Amendment in Section 9 (c) of the amended Labor Act provided that petitions under Section 9 could be filed by . . . employees . . . wishing to provide for the decertification of an existing representative . . . Investigations of such petitions under the House Bill were conducted by the Administrator provided in the House Bill. Under the Senate Amendment investigations were conducted by the Board. *Both under the House Bill and the Senate Amendment if there was reasonable cause to believe that a question of representation affecting commerce existed a hearing was to be held.* Both the House Bill and the Senate amendmend provided that if the Board found upon the hearing that a question of representation existed a secret ballot should be held and the results thereof certified."

The Senate Labor Committee's Report (80th Congress, 1st Session, Report No. 105, Calendar No. 104) on the Labor Relations Act of 1947, submitted April 17, 1947 (Page C-3 The New Labor Law—BNA) says that "the major changes which the bill would make in the National Labor Relations Act may be summarized as follows: . . . (5). In the interest of assuring complete freedom of choice to employees who do not wish to be represented collectively as well as those who do, *it requires the Board to enlarge the rights of petition in representation cases . . .*" Continuing, in its discussion of Reform in Representation Proceedings, the Report says (Page C-10 The New Labor Law—BNA): "The present Act contains virtually no directions as to how representation proceedings are to be conducted . . . Many of the current procedures developed administratively are properly subject to the criticism that the Board has made collective bargaining a 'one-way street.' *Despite the absence of discriminatory language in the Act, the Board refused to entertain peti-*

tions filed by employees who wish to demonstrate that the current or asserted bargaining representative is not the choice of the majority. The only relief for employees suffering from representation by a radical or racketeering union is to file a petition designating another union as their representative. . . . *The Committee Bill would make it necessary for the Board to entertain petitions from employees irrespective of the kind of relief sought.* . . . The present Board rules also discriminate against employers who have reasonable grounds for believing that labor organizations claiming to represent their employees are really not the choice of the majority. It is true that where an employer is confronted with conflicting claims by two or more labor organizations he may file a petition. But where only one union is in the picture, the Board denies him that right. . . . The one sided character of the Board's rules has been defended on the ground that if an employer could petition at any time, he could effectively frustrate the desire of his employees to organize by asking for an election on the first day that a Union organizer distributed leaflets at his plant. It should be noted that this may be a valid argument for placing some limitation upon an employer's right to petition, but it is no justification for denying it entirely. The Committee has recognized this argument insofar as it has point, by giving employers a right to file a petition but not until a Union has actually claimed a majority or demanded exclusive recognition. It should be observed that this amendment, like the amendment doing away with the disparity of treatment on employee petitions, does not impair the Board's discretion to dismiss petitions by employers where the existence of an outstanding collective agreement or some other special condition makes an election at that time inappropriate."

The Senate Labor Committee's Report on this section of the bill which became enacted, clearly outlines its provisions and conclusively proves by its contents that the Board acted arbitrarily and in violation of the statute in refusing to process the petition for decertification in the case at bar: (Page C-24 The New Labor Law—BNA) Section 9 (c) (1): "This permits employees to file petitions — to deprive of exclusive representative status one currently recognized by their employer as certified as their representative. Employers *are also given the right of petition after a Union has actually claimed a majority* or demanded exclusive recognition. Neither of these amendments affects the present Board's rules of decisions with respect to dismissal of petitions *by reason of an inadequate showing of representation* or the existence of an outstanding collective agreement as a bar to an election. In other words, the Board could dismiss an employee or employer's petition if a valid contract were still in effect."

It would appear from the above Report that the Board would be justified in dismissing the petition for decertification only (1) if a valid contract were still in effect, or (2) if there was an inadequate showing of representation. In the case at bar, there was no contract, and there had been adequate showing of representation since it is uncontroverted that five of the six employees affected voluntarily requested that the Union no longer be recognized as agent.

Continuing, the Report of the Senate Committee says (Page C-24): "Section 9 (c) (3): This amendment prevents the Board from holding elections more often than once a year . . ."

This section relied upon by the Board, only pro-

hibits the holding of an election where one has been held in the preceding twelve months. In the case at bar, no election has ever been held. Arbitrarily the Board has refused a determination, through an election conducted by its own agencies, of the representative status of the Union.

The House Labor Committee Report (Page D-2) (The New Labor Law—BNA) on provisions of the bill which were retained in substance substantiate the view expressed in the Senate Report that an election could and should be obtained:

"Section 9 (c) — This sets forth the procedure by which employers, employees, and representatives may obtain elections in which employees may determine whether or not they wish a representative to act as their exclusive representative, and, if so, which one . . .

B. Employer may ask for elections, but only after a representative has claimed collective bargaining rights. . . . The present Board's regulations permit employers to ask for elections, but only when two or more unions demand bargaining rights. This condition will no longer apply."

The opponents of this legislation recognized in the bill the provisions which would *require* the processing of a petition for decertification where no election had been held in the preceding twelve months: (Cong. Record, 80th Cong. 1st Session, p. 4153, 4/25/47; — page E(4) 2. — The New Labor Law — BNA).

Mr. Murray: "Section 9 (c) (1) (A) (11) of the bill would allow a peition for an election to be filed by employees who assert that 'the individual or labor organization which has been certified or is being currently recognized as the bargaining representative is no

longer a representative as defined in Section 9 (a). Such a petition would be purely negative, filed by persons who do not want a collective bargaining representative. The encouragement of collective bargaining and the maintenance of stable relationships already established would be seriously impeded if the above provisions were enacted into law. Under the guise of protecting the freeedom of workers, the section would furnish employers with a useful device for undermining the position of the baragining agent and for delaying collective bargaining. By encouraging dissident groups to file petitions, *the employer can repeatedly bring into issue* the majority status of the bargaining representatives. . . . A year could very easily elapse, therefore, *between the election and the consummation of the bargaining negotiations by a contract.* At this point, a group of dissident employees, with or without the encouragement of the employer, might demand a new election under this provision."

The early decisions from many of the Courts recognized the injustices which would be created in a change of conditions and a change of opinion of the employees. Even under the old law the Courts sought to give relief under such circumstances.

In an early case, *National Labor Relations Board Vs. Remington Rand*, 94 Fed. (2d), 862, decided Feb. 14, 1938, Judge Learned Hand recognized the difficulties inherent in a situation where conditions and employees had changed. Under that law the issue could be resolved only when a new ocassion for negotiations arose and the Union demanded renewed recognition as bargaining agent. It was held the employer should challenge the power of the Union and must invoke an inquiry of the Board if it did not bargain with the Union. "*If it does so* (invoke the inquiry), *we shall not*